



## Memorandum

Date: APR 6 1994

From: Ronald S. Luedemann  
Chief Counsel, Region VIIIBA 570  
08940189Subject: Contractor Use of Government Vehicles - Contracting with Former  
Employees and Organizations Employing ThemTo: Ronda M. Longbrake  
Contracting Officer  
Aberdeen Area, IHSThrough: Donald B. Bad Moccasin, Director  
Aberdeen Area, IHS

This will respond to your letter dated March 18, 1994 in which you solicited our advice regarding a series of contracting issues. Specifically, your letter raises the following questions: 1) whether it is permissible to allow contractor employees to use Government motor vehicles or otherwise be furnished transportation by the Government; 2) whether it is permissible to contract with a physicians' group that currently employs a former IHS physician; and 3) whether it is permissible to contract with employees who have been terminated pursuant to a reduction in force (RIF) in order to secure the same services that they formerly performed as Government employees. Each of these issues is addressed below.

May Contractor Employees be Permitted to Utilize Government Motor Vehicles or Otherwise be Furnished Transportation at Government Expense?

The use of Government-owned or leased motor vehicles is governed by regulations set forth at 41 C.F.R. Subpart 101-38.3. Section 101-38.301-1 of these regulations specifically addresses the use of such vehicles by Government contractors. That provision states, in pertinent part, that:

Heads of agencies are responsible for ensuring that the employees of contractors and subcontractors use Government-owned or leased motor vehicles for official purposes only. . . . that employees of contractors and subcontractors authorized to use Government motor vehicles use such vehicles solely in the performance of the Government contract and subcontracts thereunder; that such contractors and subcontractors establish and enforce suitable penalties for their employees who use or authorize the use of such vehicles for other than official purposes; and that appropriate provision is made for the assumption by the contractor of any cost or expense incident to use not related to the performance of

the contract without the right of reimbursement from the Government.

The above-cited regulations apply to all Government-owned or leased motor vehicles. Additional regulations apply to contractor use of interagency fleet management system (IFMS) vehicles. These regulations are set forth in Subpart 51.2 of the Federal Acquisition Regulation (FAR). Section 51.201 of the FAR specifically provides that contracting officers "may authorize cost-reimbursement contractors to obtain, for official purposes only, interagency fleet management system (IFMS) vehicles and related services." Please note that this authority is limited to cost-reimbursement contractors only. Special authorization from the Administrator of the General Services Administration is required prior to making such vehicles available to other types of contractors (See 48 C.F.R. § 51.201(c)).

In summary, there is no absolute prohibition against contractor use of Government motor vehicles. Such use may legitimately be permitted for official purposes as long as the requirements and restrictions of the applicable regulations are followed.

With regard to whether contractor employees may be furnished other forms of transportation at Government expense, we are aware of nothing that would prohibit this, provided that the contract requires such transportation and the travel involved is directly related to performance of the contract.

May the IHS Contract with a Physicians' Group to Render Services to an IHS Service Unit That Formerly Employed a Current Employee of that Physicians' Group?

We understand that this question was prompted by the fact that the former Clinical Director at the PHS Indian Health Center in Ft. Thompson, South Dakota, is now employed by a private physicians' group with which the IHS may wish to negotiate a contract for CHS services. Post-employment restrictions pertaining to former employees of the executive branch of the Federal Government are set forth in statute at 18 U.S.C.A. § 207.

Based on our telephone conversations with Mr. Bruce Renville of your office, we understand that the physician involved was an 0-5 officer in the Commissioned Corps who left Government service within the past year. As an 0-5, this officer is not subject to the post-employment restrictions applicable to former "senior employees" set forth at 18 U.S.C. §§ 207(c) and 207(d). Mr. Renville further indicates that this individual was not a "procurement official" within the meaning of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423. We further understand

that, while the IHS previously contracted with the private physicians' group, the previous contract was not in effect during the former Clinical Director's tenure at the Service Unit and, therefore, he was not "personally and substantially involved" in the award or administration of that prior contract. Additionally, we understand that he will not personally be involved in the negotiation of the contemplated new contract. Under these circumstances, 18 U.S.C.A. §§ 207(a) and 207(b), which generally prohibit a former employee from communicating with a Federal agency with the intent to influence such agency in a matter in which the former employee participated personally and substantially while employed by the Government, or in a matter which was pending under his official responsibility within a period of one year prior to his leaving Government service, also appear to be inapplicable.

As noted in implementing regulations at 5 C.F.R.  
§ 2637.101(c)(5):

The provisions of 18 U.S.C. 207 do not bar any former Government employee, regardless of rank, from employment with any private or public employer after Government service. . . . Instead, only certain acts which are detrimental to public confidence in the Government are prohibited.

In sum, under the described circumstances, the physician's prior employment with the IHS does not appear to pose an impediment to contracting with the physicians' group to which he now belongs. All otherwise applicable contracting requirements and procedures must, of course, be observed since, while it may be permissible to contract with the physicians' group, it is not permissible to contract with the group on a preferential basis.

Whether, subsequent to a Reduction in Force (RIF) undertaken to comply with reduced FTE ceilings, IHS may contract with the terminated employees to perform the same services they were performing prior to the RIF.

The Federal Acquisition Regulation (FAR) provisions pertaining to contracting for services are set forth in Part 37 of the FAR. Part 37 distinguishes between "nonpersonal services contracts" which generally are permissible, and "personal services contracts" which generally are not permissible. Nonpersonal services contracts are defined in FAR § 37.101 as contracts "under which the personnel rendering the services are not subject, either by the contract's express terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." Conversely, FAR § 37.101 defines personal services contracts as contracts that by their "express terms or

as administered, make the contractor personnel appear, in effect, Government employees." Personal service contracts are further described in FAR § 37.104(a) which states:

. . . a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

Emphasis supplied. FAR § 37.104(b) goes on to specifically provide that, "[a]gencies shall not award personal services contracts unless specifically authorized by statute." This general prohibition against contracting for personal services effectively precludes contracting with employees terminated by a RIF to have them perform the same services in the same manner as prior to the RIF.

As noted, the general prohibition against entering into personal services contracts applies unless there is specific statutory authority for such contracts. The Department of the Interior and Related Agencies Appropriations Act of 1994, Public L. No. 103-138, provides, in pertinent part, that "[a]ppropriations in this Act to the Indian Health Services shall be available for services as authorized by 5 U.S.C. 3109 . . . ." Thus, the IHS does possess authority for limited types of personal services contracts pursuant to 5 U.S.C.A. § 3109(b) which provides that: "[w]hen authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants . . . ." Please note, however, that this authority is limited to temporary or intermittent services. It is also limited to the services of experts or consultants. You should also be aware of the restrictions imposed by FAR Subpart 37.2 on contracts for advisory and assistance services, whether they are nonpersonal service contracts or personal service contracts. FAR § 37.202(c) states specifically, in pertinent part, that:

Advisory and assistance services [contracts] shall not be--

\* \* \*

(2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment practices;

(3) Contracted for on a preferential basis to former Government employees;

\* \* \*

The services of individual experts and consultants are listed as a type of "advisory and assistance services" in FAR § 37.203. Thus, contracting under the limited authority provided by 5 U.S.C. § 3109 is still subject to the restrictions imposed by FAR Subpart 37.2.

The IHS also has statutory authority to enter into personal services contracts with Tribes or Tribal organizations pursuant to the Indian Self-Determination Act, Public L. No. 93-638, as amended. Specifically, 25 U.S.C.A. § 450j(g) provides, in pertinent part, that, "[t]he contracts authorized under section 450f of this title . . . may include provisions for the performance of personal services which would otherwise be performed by Federal employees . . . ." This authority, however, is limited to self-determination contracts (i.e., so-called "638 contracts") with Tribes or Tribal organizations.

In most cases, contracting with a former employee to perform the same functions they performed when employed by the Government, would run afoul of the prohibition against personal services contracting and/or the restrictions pertaining to contracts for advisory and assistance services. However, nonpersonal services contracts (i.e., contracts under which the contractor is not subject to the type and degree of Government supervision and control that usually applies in an employer/employee relationship) with former Government employees to provide other than advisory and assistance services may be appropriate under certain limited circumstances. Even when dealing with such nonpersonal services contracting, however, the FAR provides at section 37.102 that:

\* \* \*

(b) In no event may a contract be awarded for the performance of an inherently governmental function,

[and]

(c) The relative costs of Government and contract performance require appropriate consideration where Government performance is practicable (see Subpart 7.3).

Additionally, FAR section 37.105 provides that:

(a) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met (except see 6.401 (b)),

[and]

(b) The provisions of statute and Part 6 in this regulation requiring competition apply fully to service contracts.

If you have any further questions regarding any of the issues discussed above, you may contact the undersigned at (303) 844-5101.

Ronald S. Luedemann  
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By \_\_\_\_\_  
Gary Fahlstedt  
Assistant Regional Counsel

cc: GC: BAL  
GC: PH  
IHS: DLR ✓